88-2096

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-5617
No. 88-5521

ROBERT J. BOLTON, ET AL.,
Petitioners,

vs.

TESORO PETROLEUM CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Where evidence on post-trial motions discloses to the trial court: (a) observed repeated fraternization between a bailiff and a juror (including being seen together outside of the courthouse); (b) introduction thereafter of extraneous prejudicial factual allegations in the juryroom during jury deliberations; (c) a juror complaining to another bailiff to disclose to the judge that she observed juror and bailiff misconduct and that extraneous information was in the juryroom which the juror believed was coming in through such bailiff; and (d) suppression by the bailiffs and the United States Marshal's office of the juror complaints and of that misconduct from the court; against this background does a non-evidentiary "hearing" by the trial court violate the right to a trial by a fair and impartial jury, the right to confront witnesses, and due process guarantees when the court: (1) prevents the attorneys from questioning jurors at the post-trial hearing; (2) refuses to recall jurors or to permit counsel to question jurors when their statements *in camera* to the court are refuted by other jurors, are refuted by court bailiffs and other court personnel, and where additional allegations are made to the court thereafter about those previously-questioned jurors by others on the jury; (3) refuses to inquire or to permit counsel to inquire as to how the extraneous prejudicial information got into the juryroom or was disclosed to the jurors; (4) refuses to question or permit counsel to question the bailiffs and the marshals involved about the fraternization with the jurors, the juror complaints and the non-disclosure to the court of the jurors' complaints and misconduct; (5) refuses the attorneys access to a bailiff's recorded statement describing the fraternization, the suppression of reports of misconduct from the court made by one of the bailiffs who was arrested because of his involvement in the coverup (despite the fact that the court read it and that petitioner's counsel had permission from that bailiff and the United States Attorney to see it and

to use it at the hearing on post-trial motions); and (6) directs the United States Attorney not to disclose to petitioners the facts relating to such bailiff and juror misconduct.

Answered "no" by the lower courts.

2. Upon receipt of evidence of a) observed repeated fraternization between a bailiff and a juror; b) introduction thereafter of extraneous prejudicial factual allegations in the juryroom; c) complaints by the jurors to the Marshals; and d) suppression of that information by the Marshals from the court, must a court shift the burden of proof in determining whether a new trial should be granted, and must the court factor that evidence into determining the format, structure, content and inquiry of and in a hearing to review the jury verdict?

Answered "no" by the lower courts.

IDENTIFICATION OF PARTIES

ROBERT J. BOLTON, ET AL.,
LEO A. WALKER, III
MEMBERS OF CLASS AS CERTIFIED BY COURT BELOW,
Petitioners,

TESORO PETROLEUM CORPORATION, ET AL.,
ROBERT V. WEST, JR.
M. RICHARD STEWART
Z.D. BONNER
PETER M. DETWILER
CHARLES WOHLSTETTER
L. ROBERT FULLEM
RICHARD E. DEEMS
THOMAS C. FROST, JR.
JOHN MCKETTA, JR.
ARTHUR SPITZER,
Respondents.

QUOTATION/CITATION OF LAWS/ AMENDMENTS/RULES

Rule 606 of the Federal Rules of Evidence — Competency of Juror as Witness

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, *except that a juror may testify on the question whether any outside influence was improperly brought to bear upon any juror.* Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes. (Emphasis added).

Petitioners will also rely for relief upon the Fifth, Sixth and Seventh Amendments to the Constitution of the United States.

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IN THE

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ROBERT J. BOLTON, et al.,

Petitioners,

vs.

TESORO PETROLEUM CORPORATION, et al.,

Respondents.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit denying the petitioners a new trial.

OPINION BELOW

The opinions of the Court of Appeals are reported but not yet published. Copies of the orders and opinions of the lower courts are attached hereto as Appendices A and B.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was filed on April 24, 1989. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

After a four-month trial on securities fraud and racketeering claims, and reported impasse in the juryroom, a six-member jury returned a verdict for defendants on all counts. Thereafter, the press reported juror complaints of coercion and harassment in the juryroom. Those allegations were followed by juror reports that at least one member of the jury had been meeting frequently (and impermissibly) with one of the Court Security Officers assigned to the trial. Further complaints followed, stating that extraneous information, prejudicial to the plaintiffs, had been introduced into the juryroom. Then, another Court Security Officer contacted plaintiffs and stated that he could prove that the jury process had been subverted, but that he wanted money in return for performing his duty to act on receipt of that information. Plaintiffs turned the matter over to the appropriate authorities; the Court Security Officer was arrested; and he apparently revealed his information thereafter to the arresting authorities. He entered a guilty plea. As part of the plea bargain he agreed to cooperate fully in the jury tampering investigation.

Plaintiffs sought a hearing to inquire into these specific allegations. The trial court fashioned an *in camera* examination in which the court: a) barred the attorneys from calling or questioning witnesses; b) conducted a whitewash of the situation in the guise of an investigation, by leading the juror witnesses away from complaints of coercion, influence, and juror/Court Security Officer meetings; c) refused to call or question the Court Security Officers implicated; d) failed or refused to inquire as to the source when

presented with evidence that the two holdout "defendants jurors" had resorted to introduction of extraneous information in the deliberations; e) refused petitioners access to the Arrest Transcript of the Court Security Officer who had evidence of the misconduct and coverup, and barred access to or information from the U.S. Attorney (who had received permission from the Court Security Officer to cooperate in the inquiry); and f) failed to shift the burden of proof to the defendants once evidence of these wrongs slipped through the screen thus erected by the form of the hearing.

On November 6, 1987, the United States District Court for the Western District of Texas denied plaintiffs' motion for a new trial. On February 17, 1988, the United States Court of Appeals for the Fifth Circuit summarily denied plaintiffs' petition for writ of mandamus to compel the lower court to reopen the record and to conduct a full and fair hearing (before a judge of another district) on these issues. On April 24, 1989, the decision of the trial court, denying plaintiffs' post-trial motions, was affirmed by the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

I. *The constitutional guarantees of due process, the right to confront witnesses, and the right to a trial before a fair and impartial jury require a full evidentiary hearing with the right for counsel to examine court security officers (bailiffs), and with full inquiry of jurors, where there is evidence of extraneous information entering the juryroom, plainly through observed court personnel involvement with jurors, and against a background of juryroom coercion and the suppression from the court, by its personnel, of juror complaints of such misconduct as affecting and harming their deliberations.*

II. *Upon receipt of evidence of a) observed repeated fraternization between a bailiff and a juror; b) introduction thereafter of extraneous prejudicial factual allegations in the juryroom; c) complaints by the jurors to the Marshals; and d) suppression of that information by the Marshals from the court, a court must shift the burden of proof in determining whether a new trial should be granted, and the court must factor that evidence into determining the format, structure, content and depth of inquiry at a hearing to review the jury verdict.*

This matter arises from a complaint alleging that defendants, Tesoro Petroleum Corp. ("Tesoro") and its highest officers, clandestinely arranged to misrepresent and/or to withhold information from Tesoro shareholders which was material (indeed, critical) to their investment decisions. Plaintiffs also alleged that defendants had engaged in a pattern of racketeering, and plaintiffs brought derivative claims for breach of fiduciary duty and concerning offers to purchase Tesoro which were concealed by the individual defendants.

After a trial of approximately four months, the jury deliberated for three weeks. The jurors became split, four to two, for plaintiffs. After thirteen days, the jury reported an

impasse to the court. Unbeknown to the court, the minority jurors (Jury Foreman Joseph Mullins and Juror Tammy Albrecht), who had held out for a defendants' verdict, were at that point harassing and coercing the majority jurors and were resorting to the introduction of extraneous, non-record information (passed off as fact). Also unbeknown to the court, the majority jurors attempted to convey a written complaint to the court, via the Court Security Officers and the United States Marshal, but those complaints were concealed and buried by the Marshal's office. Lacking such facts, the court sent the jury back to resume deliberations and appeared (by its lack of response) to give its blessing to the shenanigans of the Jury Foreman and his fellow juror. The majority jurors at that point gave up, and a defendants' verdict was returned. Despite the supposed secrecy of those deliberations, when the verdict was announced, the Court Security Officer somehow knew to select only Mullins and Albrecht to meet with the press, and to whisk the other jurors away.

Shortly afterward, juror complaints were reported in *The Wall Street Journal* and in the *San Antonio Express News* that the verdict was unfairly reached. The *San Antonio Express News* interviewed jurors Gloria Ochoa and Catherine Broff. "Foreman Bullied Tesoro Jury, 2 Say", (*San Antonio Express News,* September 4, 1987). Two jurors revealed that during the deliberations Jury Foreman Mullins screamed at them. Mullins and Juror Albrecht threw papers at Broff at another point in the deliberations. As Ochoa stated, the verdict was reached because, after the nightmare of those deliberations, "We gave up". Juror Broff disclosed that "I think the verdict would have been different if not for the coercion and badgering".

On the day after that article was published, the *Express News* published an interview with additional jurors (*San Antonio Express News,* September 5, 1987, "Tesoro Jurors Charges Mount"). Juror Nancy Torres complained to the

Express News of extraneous information having been introduced in the deliberations.

Concurrently with the publishing of *The Wall Street Journal* article, a Court Security Officer, Finton "Ed" Stewart, approached counsel for plaintiffs and stated that he (Stewart) had evidence that the jury process had been subverted. He tried to sell to the plaintiffs, for $1,000,000.00, his duty to report that information to the court system. The plaintiffs would have no part of it. They brought the information of Mr. Stewart's misconduct to the federal authorities. A meeting was arranged with Stewart. The meeting was attended by an F.B.I. undercover agent. Stewart was handed part of the money demanded by him. C.S.O. Stewart stated that the "jury was definitely compromised" and that "there's one piece of paper that spells it [out]." (See Federal Arrest Complaint). Stewart was arrested, and subsequently gave a complete statement to the F.B.I. (Statement of Assistant United States Attorney Wayne Speck at the hearing on the Motion for Rearraignment and Plea Before the Honorable D.W. Suttle, 10/9/87, p. 23). Apparently, transcripts of the arrest sequence and of Stewart's statement to the F.B.I. exist. They were withheld from the litigants, however, by the trial court. (Transcript, 11/6/87, p. A-4627). (Hereinafter, these transcripts will be referred to as "the Stewart Arrest Transcripts".) The Court of Appeals received and reviewed the Stewart Arrest Transcript, yet made no reference to it in affirming the order of the trial court.

C.S.O. Stewart sought and received a plea bargain agreement. Stewart's end of the plea bargain was simple. Stewart offered "to be cooperative with the government and with the Court and will testify truthfully concerning any matters relating to this investigation and in the Court's inquiry into jury tampering" by telling what he knew, fully

and forthrightly.[1] He confirmed that offer at the hearing on his guilty plea. (Transcript, 10/9/87, p. 12.) The opportunity to *fulfill* his end of the bargain was then denied.

Plaintiffs filed a supplemental motion for new trial and requested an evidentiary hearing. Plaintiffs made a detailed offer of proof of fraternization outside of court between at least one Court Security Officer and at least one juror of coercion and harassment in the juryroom; of the introduction of extraneous information by jurors in the juryroom; and of suppression of juror complaints of such misconduct by the court personnel. These pointed allegations would then be fleshed out through examination and testimony of the jurors and Court Security Officers. The court refused the offer. At the hearing, plaintiffs also offered to prove that the Marshal's Office decided that it would inform the court of the majority jurors' complaints only if Tesoro *lost*. (Transcript, 11/6/87, p. A-4615).

The court began by barring examination of *anyone* under oath, by any party. It barred plaintiffs from access to or use of the Stewart Arrest Transcripts. (See Transcript of Sentencing of C.S.O. Stewart, 12/16/87, pp. 40-41). The court also would not permit Assistant United States Attorney Speck to meet or talk with plaintiffs or their counsel. (Transcript, 11/6/87, p. A-4615).

The Court questioned Jurors Mullins and Albrecht first, *in camera*. From all accounts, Mullins and Albrecht had been the "two who swung the four" to a defendants' verdict. Having denied the attorneys any opportunity to examine Mr. Mullins and Ms. Albrecht, the court then conducted a "kid gloves" inquiry, refusing to probe at all beyond the original response to the questions. As the court

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1. Letter, 10/8/87, from P. Joseph Brake (counsel for Stewart) to Wayne Speck, Assistant United States Attorney for the Western District of Texas.

said, with regard to any possible juror/Court Security Officer fraternization allegations, "It doesn't make a particle of difference to me, but is there anything you want to tell me about that?" (Transcript, 11/5/87, p. A-4563). The court underscored its position shortly thereafter: "I just thought if you wanted to explain something, fine, but you don't have to. All right." (Transcript, 11/5/87, p. A-4564).

Mullins and Albrecht nevertheless admitted that extraneous information about mental illness suffered by the former wife of the key individual defendant, Robert West, had been passed on to the jury. That was discussed in evaluating the conflicting testimony of defendant West against that of his former secretary, Maureen Bates. The jury could certainly have been swayed toward Dr. West in sympathy for the problems he had to endure from his then-wife.[2] Even then, instead of investigating further, the court simply asked a leading question to establish that Mr. Mullins, the Foreman, told the jury to disregard that wrenching information even as he exposed the others to it. (Transcript, 11/5/87, p. A-4562).

The court then interviewed Jurors Broff, Ochoa and Torres. The court thus heard that Jury Foreman Mullins told the jurors that they were not to consider the trial testimony as evidence (Transcript, 11/5/87, p. A-4582); that Foreman Mullins would not let the jurors voting for plaintiffs review the evidence (Transcript, 11/5/87, pp. A-4582, A-4589); and that he refused Juror Broff's request to write a note to the trial judge about the problems in the juryroom and that she wanted to speak to the judge (Transcript, 11/5/87, p. A-4585). Juror Broff disclosed that more extraneous

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2. Plaintiffs have also become aware that Mullins and Albrecht managed somehow to learn and to relate to the jury an incident in which Mrs. West drew a gun on Dr. West — information which was not introduced at the trial. Plaintiffs asked the court to inquire of the jurors as to that disclosure. The court ignored the request. (Transcript, 11/6/87, pp. A-4604-5).

information was insinuated into their deliberations by Mullins and Albrecht.

The court asked a few leading questions to create a record that Juror Mullins, in effect, charged the jury to pay attention only to the evidence presented at trial each time he or Juror Albrecht dropped another juicy extraneous item on the table, as if the incantation of that perfunctory instruction would cleanse the individual and cumulative incidents described above.

The court also avoided further disclosure of this kind of damaging information by simply failing to ask the necessary, appropriate questions. Thus, in the face of all these startling disclosures, the court in its own questions never even asked Mrs. Broff whether she observed fraternization between any Court Security Officer(s) and any juror(s). It was only upon prompting by the law clerk that this critical question was asked — and even then, not directly. Again, in direct contravention of the earlier testimony of Jurors Mullins and Albrecht more critical information spilled out:

> "MR. PRIMOMO (the Court's law clerk): I'd ask the question concerning any of the security officers, contacting them.
>
> THE COURT: I did. Did you contact any of the security officers?
>
> MRS. BROFF: What, during the trial?
>
> THE COURT: Yes.
>
> MRS. BROFF: Yes, I told the security officer about, I asked him if during the trial, you know, were we supposed to talk to the security officers, and he said no.
>
> *Because Tammy Albrecht would go out there every day and talk to one of the security people, so that's why I thought maybe a security officer was leading her on towards the Tesoro side because she knew about Dr.*

West's wife, and unless she knew Dr. West, how would anybody know about that situation?

THE COURT: Okay.

MRS. BROFF: So I told him, and I don't know who he went and told, but I don't know what was said.

THE COURT: Do you know who the security officer was that you talked to?

MRS. BROFF: I don't know any of their names.

THE COURT: Okay. Was he out here?

MRS. BROFF: Yes, he was right by the door when we came in. He was at our door.

THE COURT: So you went and asked him if you were supposed to be talking to any — if you were supposed to be talking to the security people?

MRS. BROFF: Right. *And she talked to him just about every day after we'd come back from lunch.*

THE COURT: Okay. And the information, the extraneous matters, if any, that came in had to do with Dr. West's wife?

MRS. BROFF: Right. *Now, I don't know how she would have found that out. I thought, you know, he might have told her, and so I told the security guard.*

I also had asked Mullins to write a note for me to see you and he never would. (Transcript, 11/5/87, pp. A-4584-4585.)

(Emphasis added).[3]

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3. Jurors Albrecht and Mullins had told the court, before Juror Broff testified, that any idea that Albrecht had been in such contact with a Court Security Officer was, in Mullins' words, "preposterous". (Transcript, 11/5/87, p. A-4578). The court simply adopted the denials of those jurors without any probing after the refutation of those denials.

The testimony of Juror Broff was then confirmed and expanded by Jurors Ochoa and Torres. Juror Ochoa testified that (jury foreman) Mullins would not let her review plaintiffs' evidence. (Transcript, 11/5/87, p. A-4589). Juror Torres recalled yet another item of extraneous information introduced to taint the jury's deliberations. She recounted how the jurors were told by Mullins details of the most sensitive kind — an alleged settlement proposal whereby the class claims would be dropped in favor of a straight monetary settlement awarding funds to the individual plaintiffs and their counsel, which was allegedly rejected by defense counsel.

This time, even the court was taken back (albeit only momentarily):

> "MRS. TORRES: Okay. Something about Rosen (lead counsel for plaintiffs) and Mr. Miller (lead counsel for defendants) having things settled, getting things settled, and Mr. Miller had told Rosen that — oh, no, or Rosen, one or the other, said why don't you pay the exshareholders what you owe them and then we'll drop this whole thing, and Mr. Miller said no.
>
> THE COURT: When was this?
>
> MRS. TORRES: During our jury duty.
>
> THE COURT: During the trial?
>
> MRS. TORRES: Uh-huh.
>
> THE COURT: Or during the deliberations?
>
> MRS. TORRES: Deliberations.
>
> THE COURT: Deliberations. And who said this?
>
> MRS. TORRES: Mullins.

THE COURT: Mullins said this?"[4]

(Transcript, 11/5/87, pp. 4593-4).

The effect of Mullins' comment to the jury was so profound that they ". . . just stared at him." *Id.*

In closing arguments defense counsel had launched a personal attack against plaintiffs' counsel, insinuating that they and their name clients had only their individual avarice at heart, and were not truly representing a class. Yet, in the juryroom Mullins wielded an even more prejudicial weapon — the extraneous "information" of supposed *actual settlement discussions* — presented as *fact*, as described above; and he did so without judicial monitoring, also dissipating any effect of the earlier cautionary instruction.

What would have happened if, at trial, defendants' counsel said, "Why just the other night, counsel for plaintiffs even approached us and *said*, 'I'll dismiss the class and derivative claims' if you'll just pay off my individual clients and me."? A mistrial would have happened — on the spot. That sequence is only worsened when the remarks are made by the Jury Foreman, in the privacy of the juryroom, protected from the remedial reach of the court by the secrecy of those deliberations and by a Marshals' Office which would act as a wall between the jurors and their Judge, to blindfold the Court against complaints of those jurors and against knowledge that at least one juror had obviously been reached by someone who was feeding him/her allegations of

4. The reason for leading Mrs. Torres to state that the allegation was brought into the juryroom during "deliberations" rather than at trial was plainly to lay the groundwork for *avoiding* further inquiry. Federal Rule of Evidence 606 places no restriction on the inquiry unless the extraneous information was introduced during the deliberations. From this transcript even that question is not clearly answered. It appears that the questioning may have confused the witness. For this reason alone, the matter should be remanded; but the record of abuse of discretion (and of petitioners' due process guarantees) is, as noted, far more substantial.

the most damaging kind for plaintiffs. The court *had* to ask who told Juror Mullins of the alleged settlement proposal, but it did not inquire.[5]

Obviously, the court would now fully question the jurors who had been berated and misled into compromising their view that plaintiffs should receive relief. It would zero in on the contacts between the Court Security Officer and Juror Albrecht. The court would probe as to where these "facts" came from, and as to any influence exerted by the person who transmitted these statements. It did no such thing. Obviously, the court would now also allow counsel to examine the Court Security Officers thus implicated by the complaining jurors' testimony. Plaintiffs' counsel had listed the Court Security Officers as expected witnesses. Court Security Officer Stewart was present and willing to testify. The court, however, again cut off the examination.

The court totally refused to allow any questioning of, or testimony by, its Court Security Officers. Then, generating an even sharper appearance of an improper whitewash, the court cloaked the investigation with its own robe, saying that plaintiffs' counsel could not speak with the United States Attorney (thereby also preventing counsel from seeing the transcript of the F.B.I. interview with Court Security Officer Stewart); saying that it would perform its own (private) investigation; refusing to keep the Record open pending any investigation of jury tampering; and denying any right of counsel to hear, present or adduce *any* additional testimony. (Transcript, 11/6/87, pp. A-4627-8).[6]

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5. Curiously, in its effort to avoid a retrial of this matter, the Court of Appeals added a gloss to these facts. It stated that the extraneous information had simply been "overheard" at some point by Juror Mullins (rather than being passed to him by an outside source). (Opinion of the Court of Appeals, A-24) No such evidence exists anywhere in this Record.

6. It is respectfully urged that the Court obtain and review the Stewart Arrest Transcript. Petitioners have still been denied access to it, even though C.S.O. Stewart has now been sentenced.

What was it that the court was so vigilant in refusing to allow on the Record? What did the court learn in its own investigations and in its review of the Stewart Arrest Transcript? We were not allowed to know. The trial court simply denied the motion for a new trial, finding insufficient basis for such relief in its sculpted Record. The Court of Appeals received and reviewed the Stewart Arrest Transcript, and made no reference to it in affirming the order of the trial court.

The opinion of the trial court attempts to *isolate* each element of the wrongdoing. It thus urges that the presence of extraneous information in the juryroom *in and of itself* may be minimized. The court isolates the problem of coercive behavior by two jurors and holds that this fact *in and of itself* is an "intrajury" matter into which the court can inquire no further. The court isolates the fact of the violations in the Marshals' Office and urges that this fact *in and of itself* requires no further inquiry (except, as stated by the court at argument, a *private* inquiry by the court).

The case law, however, does not contain a precedent in which there was a *pattern* of wrongdoing of every kind — bailiff/juror fraternization, pollution of jury deliberations with extraneous information, coercive behavior in the juryroom, refusals to convey to the court juror complaints about such misconduct, and a cover-up in the Marshals' Office. The express exceptions in the language, history and advisory comments concerning Fed.R.Evid. 606 *welcome* inquiry into these areas. The exceptions were made for just this situation, yet the court closed off any such examination through the approach described above. The court held that the system *worked.* A verdict was reached after a long trial. A mistrial or a new trial *was* avoided. Due process and the right to trial by a fair and impartial jury were molded to the needs of expediency.

The real basis for the actions of the trial court and of the Court of Appeals appears to have been that this was a long trial, and that any verdict should, therefore, be disturbed only upon *especially* horrendous error. The Court of Appeals went so far as to quantify the volume of the record as a preface to its discussion. Respectfully, jury tampering is jury tampering. A constitutional violation cannot be disregarded because the trial took five months or five minutes. A rose is a rose is a rose, and a thorn is a thorn is a thorn.

The trial court opinion begins with a discussion of the concerns underlying Rule 606, and summarizes those concerns as based on the desire to preserve the sanctity of the *juryroom* (Opinion of the trial court, A-2). Those concerns plainly do not, therefore, apply to questioning of *non-jurors* (here, the bailiffs), about events which occurred *outside* of the juryroom (fraternization between a bailiff and a juror, conveyance by a juror to a bailiff of a complaint for the court, and the decision of the Marshals to keep that complaint and information from the court). Under the trial court's own analysis, there was no basis for barring examination of those court personnel by petitioner's counsel.

The trial court received a proffer of evidence from petitioners, to be adduced through testimony of the court personnel. The evidence would confirm that Juror Albrecht was observed away from the courthouse premises, meeting alone with Court Security Officer Dario Guerra. Petitioners sought to question C.S.O. Guerra about such contacts, and about any information conveyed to that juror by him in those meetings, or in any other sessions between them, on or off courthouse premises. The inquiry was a pointed one; the offer could not be made more specific than the testimonial basis that supported it, because further means of proof were in the hands of the person to be questioned. It was justified, proper and appropriate. Nevertheless, the lower courts sought to excuse the curtain drawn on this inquiry by

mischaracterizing petitioner's exercise of rights as a "fishing expedition". (*Cf.* opinion of the Court of Appeals at A-24.)

Further, the trial court heard one juror complain: (1) of juror/bailiff fraternization and (2) of introduction thereafter by that other juror of extraneous information. The complaining juror naturally deduced that the outside information must have come from the outsider — the bailiff. Apparently in an effort to protect a verdict reached after an arduous trial (and to shield complaining jurors who instead wanted to testify fully), the trial court then executed an incredibly acrobatic feat of logic. It was faced with two diametrically opposite lines of testimony. On the one hand, it heard from jurors who observed outside fraternization between one of their own and one of the court's own, followed by inside (the juryroom) use of information far beyond the trial record, against a background of continuing harassment and behind a wall erected by court personnel against their efforts to have the court learn of this misconduct and stop it. On the other hand, it listened to a simple denial of those pointed observations by the jurors thus accused. In such circumstances, the trial court created the expedient tactic of deciding that the denying jurors were more credible than the accusing jurors (because the accusing jurors lacked *direct* proof that the extraneous information was actually passed on by the bailiff, the proof being in the hands of the bailiffs), and *then* using that determination to bar, as "moot", any inquiry of those bailiffs. Respectfully, this is outrageous. The Court of Appeals then refused to reach the merits of this situation by, instead, incanting the canard that areas such as these are matters of discretion. (See opinion of the trial court, pp. A-2-6, 7-8; opinion of the Court of Appeals, pp. A-24-25.) The trial court even went so far as to attempt to shore up its theory for denial of relief by stating that the trial lasted for approximately five months, and that "a preponderance of [the] evidence did not favor plaintiffs, lessening any possibility of prejudice." (Opinion of the lower

court, p. A-5.) The trial court, after hearing that same evidence, sent this matter to the jury. How can the musings of the trial judge, if *he* were a juror, be brought into play to decide how to rule on foul play in the course of the jury's deliberations? Is the "sanctity of the juryroom" less sacrosanct, and the introduction of impermissible information to be winked at, if the trial judge could have agreed as a fact finder with the jury's tainted verdict? Respectfully, this cannot possibly be the standard for constitutional analysis in these circumstances.

Fed.R.Evid. 606(b) is merely a codification of pre-existing common law: *United States v. Eagle,* 539 F.2d 1166, 1170 (8th Cir. 1976), *cert. denied,* 429 U.S. 1110, 97 S.Ct. 1146, 51 L.Ed. 2d 563 (1977); *Smith v. Brewer,* 444 F.Supp. 482, 489 N.7 (S.D.Iowa 1978). The Notes of the Advisory Committee, with respect to Fed.R.Evid. 606, point out that "substantial authority . . . allows outsiders to testify as to occurrences both inside and out [of the juryroom room]," citing 8 *Wigmore on Evidence* §2354 (McNaughton Rev. 1961). Further, as to testimony by jurors concerning contacts with Court Officers, the Notes are unequivocal:

> "The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. *Thus a juror is recognized as competent to testify to statements by the bailiff* or the introduction of a prejudicial newspaper account into the jury room (citing authority).
>
> . . . *Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected.* The Rule is based upon this conclusion." (Emphasis added).

It is, therefore, immediately apparent that the court had *no* discretion on the basis of Fed.R.Evid. 606 (or on any

other basis for that matter) to refuse to allow plaintiffs in this hearing to examine Court Security Officers themselves concerning their contacts with the jurors and concerning influences brought to bear upon the jury or extraneous information passed to the jury or members thereof. The court had no discretion to refuse to inquire as to the source of each piece of extraneous information. The court, then, committed plain error in thus "foreclosing" the testimony at the subject hearing. [See also *Mattox v. United States,* 146 U.S. 140, 13 S.Ct. 50, 53, 36 L.Ed. 917 (1892)].

Fed.R.Evid. 606 has been unevenly applied by the courts, but one theme is consistent: where the court becomes informed of the presence of extraneous information in the juryroom or of outside contacts with jurors, either a new trial will directly result or, at the very least, a *full* hearing will ensue. As noted by the court in *Government of the Virgin Islands v. Gereau,* 523 F.2d 140 (3rd Cir. 1975) *cert. denied,* 424 U.S. 917, 96 S.Ct. 1119, 47 L.Ed. 2d 323 (1976), "Courts applying the rule [606] were, however, early aware that any flat prohibition against receiving such testimony contravened another public policy: that of 'redressing the injury of the private litigant' where a verdict was reached by a jury not impartial." (citing authority). 523 F.2d at 148. See also *Re Beverly Hills Fire Litigation,* 695 F.2d 207 at 213 (6th Cir. 1982). As noted in *Turner v. Louisiana,* 379 U.S. 466, 85 S.Ct. 546, 549, 13 L.Ed. 2d 424 (1965), "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury."

Constitutional standards concerning rights to a fair trial before an impartial jury are equally applicable in criminal or civil matters: *Port Terminal & Warehousing Company v. John S. James Co.,* 92 F.R.D. 100, 105, n.2 (S.D.Ga. 1981). As stated in *King-Size Publications, Inc. v. American*

News Company, 194 F.Supp. 109 at 110 (D.N.J.) *cert. denied,* 368 U.S. 920, 82 S.Ct. 242, 7 L.Ed. 2d 136 (1961):

> . . . [A] fair and impartial jury is an essential element of every trial. And that means that *every* juror must be of the type qualifying as fair and impartial. Time after time the courts have stressed the indefectibility of this requirement. And since the principles of justice are universal, in spite of the fact that in criminal cases human liberty and life may be at stake, the same requisites of proper administration of justice must exist in principle for all legal proceedings, civil or criminal. Therefore the same high standards for jurors must be adhered to in civil litigation as prevail in criminal trials.

In *United States v. Howard,* 506 F.2d 865 (5th Cir. 1975), the court confirmed that the fact of extraneous information being present in the juryroom entitled the defendant to a full hearing to determine if there was any reasonable possibility of resultant prejudice:

> "Modern day trials are factually presented in open Court before the iron curtain descends upon the jury room. We cannot tolerate prejudicial factual intrusion into that sanctum lest our Courts return to darker days of our jurisprudential history. The dagger of hidden evidence must not be taken from its scabbard for the first time in the jury room to wound the defendant; and *unless its piercing effect is only skin deep and without prejudice to the anatomy of the trial, we must apply a constitutional salve.*" 506 F.2d at 866. (Emphasis added).

The court in *Re Beverly Hills Fire Litigation, supra,* spoke even more expansively of this policy:

> "Our circuit has recognized that such an error can rarely be viewed as harmless. The jury's receipt of such extraneous information 'requires that the verdict be set

> aside, unless entirely devoid of any proven influence or the probability' of such influence upon the jury's deliberations or verdict. (citing authority) . . . While influence on a single juror may be enough to necessitate reversal and remand (citing authority), the error is particularly grievous because a unanimous verdict was required and the juror communicated his findings to other jurors. We conclude that the controlling law permits no alternative to reversal." 695 F.2d at 215.

See also, *Parker v. Gladden,* 385 U.S. 363, 87 S.Ct. 468, 471, 17 L.Ed. 2d 420 (1966); *United States v. Castello,* 526 F.Supp. 847, 849 (W.D.Tex. 1981) (Once a juror has breached his duty by infecting the jury's deliberations with extrinsic material, a new trial will be warranted if there is a reasonable possibility of resulting prejudice therefrom; and where a breach of the juror's duty is shown, there is a rebuttable presumption of prejudice which shifts the burden of proof on the issue of a new trial to the other party.)

That standard applies equally to evidence of communications between court personnel and jurors regarding matters pertaining to the verdict: *Government of the Virgin Islands v. Gereau,* 523 F.2d 140 at 150, 153-154 (3d Cir. 1975) ("presumptively prejudicial" establishes "prima facie prejudice").

In other words, both the policy of avoiding harassment of the jury by asking questions prying into their actual mental processes in the deliberations *and* the policy of protecting the sanctity of the system itself by requiring that the verdict be based on the evidence from the witness stand, will be served by a rule providing that once information exists of fraternization between court personnel and jurors, or of extraneous prejudicial information having been introduced to the juryroom, *or* of the withholding from the court of juror complaints to just that effect, the burden shifts to

the verdict winner to disprove such information or influences or cover-up. That Rule must also take cognizance of the *use* of the extraneous information in a scheme of coercion in the juryroom, in determining the question of prejudice. The focus will remain on the evidence itself, so that neither side will be in a position to harass jury members about the actual effect of this information on their *thinking* as they reached their verdict.

In *Re Beverly Hills Fire Litigation, supra,* the trial lasted eleven weeks. While the jury was deliberating, a juror conducted a homemade test of opinion evidence adduced at trial, and reported his beliefs to six other members of the jury. After a verdict for the defendants was subsequently rendered, plaintiffs moved for a new trial. The lower court denied the motion, attempting to characterize this intrusion as harmless when viewed against the length of the trial and the amount of other evidence produced. The incident was thus characterized (as has been done by the trial judge here) as "of minor consequences" and "not a sufficient intrusion upon the deliberative process as to require the setting aside of the jury verdict." (695 F.2d at 212). The Court of Appeals disagreed and reversed: 695 F.2d at 213. It noted that "Whatever the juror's motives, however, the potential for prejudice inherent in an out-of-court experiment in this case remains." *Id.,* at 213.

In *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), the court was presented with post-trial evidence of private communication by an unnamed third person to a juror during trial. Counsel for the party against whom the verdict was eventually rendered would have moved for a mistrial *at that earlier stage,* had the information of the contact been disclosed when it was made. The court found such circumstances "presumptively prejudicial" and held that in such circumstances the burden rests heavily upon the Government to establish, after notice

to and a hearing of the defendant, that such prejudice actually did *not* arise. *Id.*, at 451.

Here, a juror passed a complaint to a Court Security Officer well *before* the verdict was reached. She complained of fraternization between court personnel and a juror. She complained that the juror had then introduced extraneous information into the juryroom which, the complaining juror deduced, must have come from the Court Security Officer. She complained *then* that those circumstances were causing real problems with the jury process.

Internal procedures required that such a complaint be taken to the court *right then* by the United States Marshal. Had those procedures been followed, rather than violated, the inquiry would have been made, and a mistrial or other appropriate relief or protection would have been fashioned. Fed.R.Evid. 606 only applies to post-verdict problems. Where, as here (having limited the inquiry by operation of Rule 606), the record discloses the kind of problems that existed — pre-verdict — Rule 606 has no further application and the balance weighs in favor of protecting the public trust in the system itself.

It is also to be noted that in allowing the evidence (barred by the lower court here) to determine the issue of prejudice, those courts found it totally appropriate to inquire as to *whether* the extraneous information or contact had an influence, even though Fed.R.Evid. 606 stopped inquiry beyond that question, as to the precise *weight* given the information in the juror's mind. In *Re Beverly Hills Fire Litigation,* the court, in finding a presumption of prejudice, relied in part on a letter from a juror stating that she felt she had been influenced by the extraneous information at issue there. 695 F.2d at 215. In *Parker v. Gladden, supra,* the trial court hearing had apparently involved the type of examination here, and the court took note of testimony by one

juror, on recall, that she "must" have been influenced. 87 S.Ct. 473, n.3.

Here the lower court failed to shift the burden as required, and failed to factor the shifted burden into either the type of hearing required in such circumstances, or into its evaluation of the evidence. The Fifth Circuit, in its effort to avoid another long trial, hid behind the concept that a trial judge is given leeway in determining what type of hearing to hold, in avoiding a real due process examination of what actually happened here. The Court of Appeals nevertheless *did* admit, at least that, "the line between consideration of facts not received in evidence and extraneous influence is uncertain at the margins." (Opinion of the Court of Appeals at A-25.)

REASONS FOR GRANTING THE WRIT
CONCLUSION

The trial court, by its conduct, and the Court of Appeals, rewarded the defendants with a confirmation of their success experience gained from a jury tainted by impermissible outside fraternization with Court Security Officers, through introduction of impermissible extraneous information to the juryroom, and through coercion by jurors of others on the jury, and through the apparent cover-up by the C.S.O.'s/Marshals of juror complaints of misconduct in the juryroom. The court winked at such frightening facts, and, in effect, suppressed evidence rather than acting to ensure a fair trial. Jurors who *wanted to air their complaints* of this harassment were prevented from doing so by a court which explained that it was only acting to "protect" them from having to submit to inquiry on just that set of complaints which they *sought* to discuss.

Fed.R.Evid. 606 is not and cannot possibly be tortured to be a basis for barring access by counsel to evidence of an investigation of improper contacts by court personnel with jurors during their jury service in the case. There is no authority whatsoever to justify a bar to examination by counsel of court personnel, placed by complaining jury members as having fraternized with a juror who then poisoned the deliberative process with extraneous information which was extremely sensitive and of the type which would be presumptively prejudicial. The remaining body of case law is, at least, in conflict; the Court of Appeals has admitted that the line to be followed is "uncertain." In such circumstances, a writ of certiorari is entirely appropriate: *Johnson v. Bennett,* 393 U.S. 253, 89 S.Ct. 436, 21 L.Ed. 2d 415 (1968); *F.T.C. v. Flotill Products, Inc.,* 389 U.S. 179, 88 S.Ct. 401, 19 L.Ed. 2d 398 (1967); *Mitchell v. Robert De Mario Jewelry, Inc.,* 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed. 2d 323 (1960); *Marshall v. United States,* 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed. 2d 1250 (1959).

WHEREFORE, movants, plaintiffs, request that the Court issue a Writ of Certiorari to hear this matter and to articulate the standards for the type of hearing to be afforded.

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By _____
Attorneys for Petitioners

Dated: June 22, 1989

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-5617
No. 88-5521

ROBERT J. BOLTON, ET AL.,

Petitioners,

VS.

TESORO PETROLEUM CORPORATION, ET AL.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

ORDERS AND OPINIONS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

SA-82-CA-824

ROBERT J. BOLTON, ET AL.,

Petitioners,

vs.

TESORO PETROLEUM CORPORATION, ET AL.,

Defendants.

SA-82-CA-825

ROBERT J. BOLTON, ET AL.,

Plaintiff,

vs.

ROBERT V. WEST, ET AL.,

Defendants.

ORDER

On this day came on to be considered the motion of plaintiffs for a new trial, and the supplement thereto, and the defendants' responses thereto. In the original motion, plaintiffs base their request for a new trial upon: (1) improper personal attacks on plaintiffs' counsel in closing arguments, (2) this Court's allowing evidence concerning plaintiffs' insider trading while not allowing plaintiffs to introduce evidence of the state court case in rebuttal and (3) the jury's knowledge that Randall B. Murphy was actually

Richard B. Miller. The Court finds these allegations to be without merit, and they are overruled. In the supplement to the motion, plaintiffs make various assertions of jury misconduct, including the introduction of extraneous information into the jury room.

A district court has broad discretion in deciding whether to grant a new trial for juror misconduct, and also has discretion in the methods used to gather sufficient evidence to decide the issue. *Carson v. Polley,* 689 F.2d 562, 580 (5th Cir. 1982). The trial court may tailor the investigation so as to minimize the harm likely to result from invading the sanctity of the jury room, while recognizing the need for an adequate hearing of the misconduct allegation. *Martinez v. Food City, Inc.,* 658 F.2d 369, 374 (5th Cir. 1981). This Court has, therefore, chosen to interview the jurors individually in chambers outside of the presence of the parties and their attorneys. The Court also requested counsel for plaintiffs and defendants to prepare a list of witnesses they propose to call, as well as a proffer of their testimony. Having considered the proffer as made in the list and by plaintiffs' counsel at the hearing, the Court is convinced there is no need for the taking of further evidence.

Rule 606(b), Fed.R.Civ.P., provides that:

> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter

about which the juror would be precluded from testifying be received for these purposes."

It is clear that neither the Court nor the parties can examine and evaluate the thought-processes of the jurors during deliberations. Any matter or statement occurring during deliberations and any effect thereof cannot form the basis of post-trial inquiry or of a new trial. A juror can testify concerning whether extraneous prejudicial information was improperly brought to the jury's attention. *Rushen v. Spain,* 464 U.S. 114, 121 n. 5, 104 S.Ct. 453, 457 n. 5, 78 L.Ed.2d 267 (1983). *Maldonado v. Missouri Pacific Ry. Co.,* 798 F.2d 764, 770 (5th Cir. 1986), *cert. denied,* 107 S.Ct. 1571 (1987). But even as to such information, the juror cannot give evidence as to the effect such extraneous influence had on the minds of the jurors and their deliberations. *Mattox v. United States,* 146 U.S. 140, 149, 13 S.Ct. 50, 53, 36 L.Ed. 917 (1982). *United States v. Howard,* 506 F.2d 865, 869 (5th Cir. 1975).

Plaintiffs contend that jurors Mullins, the foreman, and Albrecht intimidated and threatened the other jurors, thus coercing them into rendering a verdict for defendants. Intimidation and harassment, and other intrajury influences on the verdict fall within the general rule proscribing evaluation of the jury's thought processes. *Government of Virgin Islands v. Gereau,* 523 F.2d 140, 149-150 (3rd Cir. 1975), *cert. denied,* 424 U.S. 917 (1976). *Smith v. Brewer,* 444 F.Supp. 482, 487 (S.D. Iowa), *affirmed,* 577 F.2d 466 (8th Cir.), *cert. denied,* 439 U.S. 967 (1978). *See, Shillcutt v. Gagnon,* 827 F.2d 1155, 1158 (7th Cir. 1987). *United States v. Ayarza-Garcia,* 819 F.2d 1043, 1051 (11th Cir. 1987). *United States v. Lamp,* 779 F.2d 1088, 1097 (5th Cir.), *cert. denied,* 106 S.Ct. 2255, 3283 (1986). *United States v. Badolato,* 710 F.2d 1509, 1515 (5th Cir. 1983). *United States v. Blackburn,* 446 F.2d 1089 (5th Cir. 1971), *cert. denied,* 404 U.S. 1017 (1972). Related to the intimidation claim are plaintiffs' assertions that Mullins, the court

security officers and the marshals failed to tell the Court of the concerns of some of the jurors about Mullins' conduct during deliberations. Assuming such failure occurred, it is of no consequence to this case and cannot merit a new trial. The conduct of the foreman in the jury room during deliberations constitutes an intrajury influence with which this Court cannot be concerned in a post-trial attack on the verdict.

Plaintiffs have also alleged that extraneous prejudicial information was introduced into the jury room. Initially, there exists a presumption of jury impartiality, and prejudice will not be presumed. *United States v. Winkle,* 587 F.2d 705, 714 (5th Cir. 1979). However, a presumption of prejudice arises when it is shown that contact with a juror occurred. *Remmer v. United States,* 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 645 (1954). *United States v. Howard.* The trial court must determine: (1) what, if any, extraneous matter was disclosed in the jury room, and, if so, (2) whether there was a reasonable possibility that it was prejudicial. *United States v. Howard. United States v. Castello,* 526 F.Supp. 847, 849 (W.D. Tex. 1981). The trial court must be careful to preclude inquiry into any influence the alleged prejudical extrinsic matter had upon the jurors, and it must avoid examination concerning any other aspect of the jurors' mental processes. *United States v. Howard.* Based upon the objective demonstration of extrinsic factual matter disclosed in the jury room, the trial court must determine the reasonable possibility of prejudice. *Ibid*

Having interviewed the jurors, the Court is convinced that the only extraneous matter which was brought to the jury's attention concerned the institutionalization of Dr. West's first wife and brief settlement discussions between Mr. Rosen and Mr. Miller. Mullins mentioned this fact concerning Dr. West's first wife during the trial, and it was again raised during deliberations. Both facts were mentioned only briefly and, afterwards, Mullins directed the

other jurors that they could not be considered. The testimony of the jurors suggested that these facts were of little or no significance. Whether the information regarding Dr. West's first wife even constitutes extraneous information under Rule 606(b) is uncertain since the fact does not pertain to the merits of this case. In any event, the Court finds that there is no reasonable possibility that plaintiffs were prejudiced by the introduction of these facts.

The jurors, when asked about extraneous matters, also stated that several non-factual issues were discussed such as the existence of insurance coverage to pay any judgment against Tesoro, the impact in the community of a judgment against Tesoro, whether current shareholders would pay a judgment against Tesoro, whether plaintiffs would have to pay costs of trial in the event of a hung jury, and that plaintiffs would, if they prevailed, recover treble damages. The jurors' discussion of the likelihood of insurance coverage and its effect concerns intrajury matters and cannot impeach the verdict. *Farmers Cooperative Elevator Assoc. v. Strand,* 382 F.2d 224, 230 (8th Cir.), *cert. denied,* 389 U.S. 1014 (1967). This Court is of the opinion that the other issues similarly involve the internal functioning of the jury and are proscribed by Rule 606(b) as a basis for challenging the verdict. Though arguably improper topics of discussion, they do not amount to extraneous information. The only extraneous facts which the jury did consider was the matter of Dr. West's first wife and the settlement discussions, and, as noted above, the introduction of those facts did not prejudice plaintiffs. The evidence in this trial lasted for approximately five months, and a preponderance of that evidence did not favor plaintiffs, lessening any possibility of prejudice. *See, Port Terminal and Warehousing v. John S. James Co.,* 92 F.R.D. 100, 106 (S.D. Ga. 1981).

Plaintiffs argue that Rule 606(b) should not preclude examination into what would have happened had the problems in the jury room been made known to the Court prior to the verdict, as juror Broff attempted to do. The

Court disagrees. Rule 606(b) precludes post-verdict examination of intrajury matters, and the fact remains that this is a post-verdict proceeding. It would thwart the policy reasons behind the proscription to allow an investigation on that basis. Additionally, it would require too much speculation as to the action that would have been taken. While plaintiffs ask the Court to examine the issue as if it had been raised before the verdict, they base their complaints of jury misconduct to a large extent on what has happened and what has been said since the verdict. There is no way to know now exactly what complaints of jury misconduct would have been made then. Juror Broff's testimony about her conversation with the court security officer during deliberations indicated that she was only assuming wrongdoing. Finally, based upon what the Court now knows about the conduct in the jury room, there is no basis for a new trial, thus, the matter of the marshal's failure to bring any reports to the Court's attention is moot.

Plaintiffs have also argued that Mullins and Albrecht were biased in favor of defendants and committed to them from the beginning of the trial. Plaintiffs contend that defendants West, Bonner and Frost are members of the Board of Trustees at Southwest Research Institute, where Mullins' father has worked for 25 years and where Mullins' girlfriend recently was hired. They argue that once the evidence at trial showed the connection between defendants and the Institute, Mullins was obligated, but failed, to disclose these conflicts to the Court. A district court can receive testimony and grant a new trial if a juror's testimony relates to the concealment or giving of false information during voir dire. *Maldonado v. Missouri Pacific Ry. Co.* While thought processes of jurors are protected, a juror can testify concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide. *Rushen v. Spain.* The proper time to discover such prejudices is when the jury is selected and peremptory challenges are available. *United States v. Duzac,* 622 F.2d 911, 913 (5th Cir. 1980).

A jury verdict cannot be disturbed merely because personal prejudices were not put aside during deliberations. *Ibid.* And the failure of a juror to disclose information at voir dire does not require a new trial in the absence of a showing of prejudice. *Vezina v. Theriot Marine Service, Inc.*, 554 F.2d 654, 656 (5th Cir. 1977).

Albrecht denied any bias in defendants' favor and no factual evidence to the contrary exists. Mullins also denied any predisposition to defendants and testified that he did not learn until after the verdict that three of the defendants are trustees at the Institute. His knowledge that his father was employed there and that his girlfriend had applied there for a job had, therefore, no bearing on this case. During trial, Dr. Robert West testified that in 1947 or 1948, he was offered a job at the Institute by Tom Slick, its founder. He decided instead to work for Slick in the oil and gas business, where he stayed until 1964 when he formed Tesoro. There was no mention of any connection since then between any defendant and the Institute. There has been no showing that Mullins withheld or falsified any information during voir dire, and Dr. West's association with the Institute's founder 23 years ago is too remote and tenuous to create any obligation on Mullins' part to reveal the present interests of his father and his girlfriend in the Institute.

Having heard the testimony of the jurors, the Court feels compelled to comment on what obviously were highly exaggerated and unfounded allegations of jury misconduct, the effect of which was magnified by the extensive media coverage. Such allegations are serious matters, necessitating the type of inquiry conducted here, and because they are so serious, they should not be made lightly. These jurors were accused of bias in favor of defendants, concealment of conflicts of interest, romantic involvement with court personnel, and considering extraneous prejudicial information in violation of this Court's instructions. Such accusations reflect not only on their integrity as jurors but also their personal lives. All of these claims are wholly unfounded. The

jurors patiently listened to the evidence without predisposition to one side or the other. The extraneous facts which were brought to their attention were extremely minor in the context of this lengthy and complicated case, were discussed only briefly, and did not prejudice plaintiffs. As Mullins stated, the claim of a romantic involvement between a court security officer and another juror was "preposterous".

As for the deliberations themselves, the consensus among the jurors was that foreman Mullins directed the jury's attention to the evidence and to the Court's charge, and away from discussion of other matters. The jury spent five months listening to the evidence (much longer than the parties, at the beginning, had represented the trial would take) and two weeks in deliberations. While jury duty is almost always an inconvenience, the sacrifice these jurors made was above and beyond the call of duty. They arrived at a unanimous verdict in the jury room and, after the verdict was read in open court, confirmed their decision.

The Court wishes to express to the jurors its regret that they were subjected to such accusations, and the necessity of the inquiry by the Court. They conducted themselves in an exemplary fashion, and performed an extraordinary task under the most difficult of circumstances. Despite what has happened, it is this Court's hope that they will not remember their experiences in this trial as unpleasant ones but with pride in the knowledge of a job well done and of the essential part they played in the functioning of the judicial system of the United States.

It is, therefore, ORDERED that plaintiffs' motion for new trial is DENIED.

SIGNED this 6th day of November, 1987.

/s/ H.F. GARCIA
United States District Judge

APPENDIX B

ORDERS AND OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-5521

In Re:
ROBERT J. BOLTON, ET AL.,
Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas

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Before GEE and JONES, *Circuit Judges.*

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 87-5617
88-5512
88-5534

ROBERT J. BOLTON, ET AL.,
Plaintiffs-Appellants,

vs.

TESORO PETROLEUM CORP., ET AL.,
Defendants-Appellees.

ROBERT J. BOLTON, ETC., ET AL.,
Plaintiffs-Appellants,

vs.

ROBERT V. WEST, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Western District of Texas

(April 24, 1989)

Before GEE, REAVLEY, and HIGGENBOTHAM, *Circuit Judges.*

HIGGINBOTHAM, *Circuit Judge:*

After more than five months of trial, including nearly three weeks of deliberations, a jury returned a defense verdict on all claims in this combined class action and derivative suit brought by disgruntled investors in Tesoro Petroleum Company. Appellants, asserting a variety of arguments, seek a second trial. We reject the request, affirming on all substantive issues, modifying only the district court's award of costs.

I. FACTUAL AND PROCEDURAL BACKGROUND

The record comes to us in eighteen boxes, including a 156 volume trial transcript. The relevant events, however, sort to three factual contexts, broadly stated.

A. *Foreign Payments and the Grand Jury Investigation*

Before the Foreign Corrupt Practices Act of 1977,[1] Tesoro Petroleum Company made "sensitive payments" designed to influence officials of foreign governments on matters of interest to the company. Tesoro's payments to foreign officials first came to light during an Internal Revenue Service investigation. The Securities and Exchange Commission also began an investigation, and Tesoro elected to participate in the SEC's "voluntary disclosure" program. In 1977, Tesoro's Board of Directors, created a special committee of independent, outside directors responsible for investigating the sensitive payments, recommending actions to be taken, and reporting to the SEC. The committee hired two Houston law firms as counsel, Fulbright & Jaworski and Vinson & Elkins, and the Fulbright firm conducted an extensive investigation concluded by its final report. The report discussed evidence of payments to officials or other questionable activities in six foreign countries. Acting on legal advice, the special committee disclosed certain payments in a Form 8-K filed with the SEC. The SEC then began a formal investigation, ending with a consent judgment requiring Tesoro to file a supplemental Form 8-K and enjoining future violations. The SEC referred the sensitive payments matter to the Justice Department, and a grand jury began an investigation in 1978. The grand jury also investigated whether Tesoro or any of its officers had defrauded the government or obstructed justice in connection with the various investigations.[2]

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1. *See* 15 U.S.C. §78dd-1,2.

2. The grand jury investigation is discussed in *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982).

In 1981, Tesoro's Board of Directors created another special committee, composed of four independent, outside directors. That committee hired Kirkland & Ellis as independent counsel and set about to discharge its responsibility to monitor the grand jury investigation and make any required disclosures. Tesoro had disclosed the pendency of the grand jury investigation when it began. In a January 25, 1982 proxy statement, the 1981 Special Committee, after referring to the Fulbright & Jaworski investigation, SEC investigation, and the Forms 8-K describing the investigations, disclosed the following:

> A Federal Grand Jury sitting in Washington, D.C. is currently conducting an inquiry into certain aspects of the matters involved in the Special Committee's and the SEC's investigations. The Grand Jury inquiry is continuing, and the Company is unable to predict at this time what the effect of such investigation, or the findings resulting therefrom, will be. The Company is cooperating fully in an effort to expedite the disposition of this matter.
>
> Dr. West participated in, or had knowledge of, most of the transactions covered by the Special Committee's and the SEC's investigations. Certain other members of the Board of Directors participated in, or had knowledge of, to varying degrees, some of such transactions.

The grand jury ended its investigation in 1984 without returning any indictments.

B. *The Diamond Shamrock Approach*

In August 1980, Diamond Shamrock Corporation informed Tesoro that it had acquired 4.5 percent of Tesoro's common stock. On August 20, an informal telephonic conference was held for all available Tesoro directors. After hearing advice from attorneys and financial advisors, the Board members unanimously resolved that Tesoro was not for sale and that they would resist offers not deemed to be in

the shareholders' best interests. Tesoro communicated its position to Diamond Shamrock that same day.

On August 21, Diamond Shamrock's Board of Directors authorized its Chairman to initiate a tender offer for Tesoro common stock not to exceed $38 per share. A week later, Diamond Shamrock informed Tesoro that it had abandoned plans to acquire more Tesoro stock. In the interim, Tesoro had sued Diamond Shamrock to block the takeover and the government of Trinidad and Tobago, majority partner in a Tesoro-Trinidad joint venture, announced its opposition to any acquisition of the company. The parties agree that this announcement caused Diamond Shamrock to lose interest in the takeover attempt. Appellants asserted at trial that the acts of the Trinidadian government were prompted by Tesoro.

C. *Reorganization Plans*

During the Diamond Shamrock episode, speculation carried Tesoro's stock up over $32 per share, but at its end prices dropped, at times falling below half of the previous highs. Tesoro considered reorganization. Lazard Freres & Co. developed the first plan for reorganization, describing it in a January 11, 1982 memorandum. The Lazard Freres plan envisioned that a public company would be spun off to shareholders, its assets consisting primarily of Tesoro's oilfield service businesses. Refinery and marketing assets would be sold for cash to a new private company owned by Lazard, outside investors, and Tesoro's management. Other assets would be liquidated.

In early January, trading in Tesoro stock increased, apparently responding to rumors of a reorganization. On January 25, the same day the proxy statement disclosed the grand jury matter, Tesoro issued the following press release:

> In response to the recent market activity in its stock, Tesoro Petroleum Corporation announced today that

> its management and investment bankers are considering several courses of action to alleviate the undervaluation of the company's stock in the market. Among the steps being considered are the distribution of certain of the company's operations to its shareholders and the sale of other company operations for cash which would be distributed to the shareholders. The announcement emphasized that there is no assurance that any of the actions being studied will be adopted by the company.

At that time, the Lazard Plan had not been presented to the entire Board of Directors.

The Board was informed about the Lazard Plan at its January 27 meeting. Since certain directors would potentially be investors in the new private company, the Board created another special committee of independent, outside directors, identical in membership to the committee reviewing grand jury disclosures. The committee was asked to review the Lazard Plan for fairness to shareholders and to consider other alternatives to increase the value of Tesoro stock. The parties differ over how close the Lazard Plan was to implementation at this point. Appellants point out that Lazard Freres had already found a lender interested in leading a syndicate of banks to finance the plan, as well as certain investors willing to purchase preferred stock in the private company. Appellees argue that financing for the private company was still contingent, and that the Lazard Plan faced other contingencies such as obtaining Board and shareholder approval and finding purchasers for Tesoro assets.

By mid-May, Tesoro decided not to pursue the Lazard Plan further. The parties dispute why. Appellants emphasize testimony that implementing the Lazard Plan would have required the company to make additional disclosures about the grand jury investigation. However, the same witness also identified three other "bullets" which made the plan unfeasible, including a contingent tax liability, claims

asserted by the Department of Energy based on alleged overcharges for regulated oil, and a California Public Utility Commission order threatening the abrogation of a profitable contract between Tesoro's Alaskan refinery and San Diego Gas & Electric Company. Two other members of the 1982 Special Committee testified that deterioration in the oil and gas industry contributed to the decision. Appellees emphasize that Lazard Freres determined independently to withdraw the Lazard Plan, and allegedly communicated this decision to Tesoro's CEO before the 1982 Special Committee made its report. Appellants believe that the leveraged buy out plan was stalled only temporarily, pointing to handwritten notes taken at a meeting which described the "going private part of plan" as "dead for [the] time being."

After the demise of the Lazard Plan, Tesoro quickly developed an alternative plan of reorganization. The new plan called for splitting Tesoro into two public companies, one running the oilfield services business, and the other operating the refining business. While this scheme resembled the Lazard Plan in some respects, it did not require the financing of a leveraged buy out. The two public companies plan was presented to the Board of Directors on May 26, 1982, and described in a press release the next day. But appellants saw this alternative plan as a sham designed to mask Tesoro's true intention, to repurchase Tesoro stock as the first step of a scheme to take the company private.

Tesoro eventually abandoned the two public companies plan and, on July 28, 1982, announced a "self-tender offer" for its own stock at $22 per share, substantially above the going market rate. Three investment banking firms gave opinions that the $22 price was fair to all Tesoro shareholders, and the tender offer was oversubscribed. But appellants saw the offer as a Tesoro effort to reduce outstanding shares and eliminate dissident shareholders to facilitate a later leveraged buy out. Appellees assert that the problems in the

oil and gas industry made any restructuring of Tesoro unfeasible, and that the stock repurchase was not considered at all until early July.

D. *Claims Asserted*

This appeal involves two separate lawsuits which were consolidated for trial. The class action was filed on October 1, 1982, soon after Tesoro's stock repurchase. The named class plaintiffs were Robert J. Bolton, George E. Meyer and Leo A. Walker, III. Mr. Meyer voluntarily withdrew as a named plaintiff a few months after suit was filed, though he remained a class member. The derivative action was filed by Bolton on October 7, 1982. Defendants in the two actions included Tesoro Petroleum and various individuals associated with the relevant events. Lazard Freres and one of its partners settled before trial, while two outside directors were voluntarily dismissed by the plaintiffs.

1. *Class Action Claims*

The district court certified four classes of investors:

1) The "Buyer Class" included all purchasers of Tesoro common or preferred stock from January 25, 1982 (date of grand jury disclosure) until suspension of trading in Tesoro stock on May 27, 1982 (press release announcing consideration of two public companies plan).

2) The "Seller Class" included all sellers of Tesoro common or preferred stock from after the suspension of trading on May 27, 1982 through September 30, 1982 (filing of lawsuit).

3) The "Proxy Class" included all record shareholders as of January 14, 1982 who were entitled to receive the January 25 proxy statement in connection with management's solicitation of proxies for the February 24, 1982 shareholder meeting.

4) The "Tender Class" included all who tendered shares of common stock or converted shares of convertible preferred stock pursuant to the July, 1982 tender offer.

There were two damage claims based on alleged violations of SEC Rule 10b-5.[3] First, the Buyer Class asserted injury from the allegedly inflated market price of Tesoro common stock and call options caused by material misrepresentations and omissions from January 25, 1982 to May 27, 1982. Second the Seller and Tender classes claimed injury from an alleged deflation of Tesoro's stock between May 27, 1982 and September 30, 1982, caused by the May 27, press release that misled investors regarding the defendants' true intentions.

The plaintiffs also asserted claims premised on the Racketeer Influenced and Corrupt Organizations Act,[4] alleging that the defendants conspired to conduct and maintain control of Tesoro through a pattern of racketeering activity. The Rule 10b-5 claims, state law commercial bribery, obstruction of justice, and wire and mail fraud were its predicate acts. RICO damages were premised on the alleged Rule 10b-5 violations and on an asserted loss of the "value of control" of Tesoro. Plaintiffs also requested equitable relief for the Proxy Class, including removal of certain directors, based on alleged violations of SEC Rule 14a-9,[5] and SEC Regulation S-K.[6]

2. *Derivative Claim*

Plaintiff Bolton asserted a derivative claim on behalf of Tesoro. He sought indemnification from responsible defendants for any liability of Tesoro in the class action. He

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3. 17 C.F.R. §240.10b-5.

4. Plaintiffs' asserted claims based on 18 U.S.C. §1962(b)-(d).

5. 17 C.F.R. §240.14a-9.

6. 17 C.F.R. §§229.402, 229.404.

also asserted injury to Tesoro based on the defendants' hostile reaction to the Diamond Shamrock takeover approach.

II. ARGUMENTS ON APPEAL

A. *Jury Instructions*

1. *Materiality*

Appellants object to the district court's instructions on the "materiality" of facts allegedly misrepresented or omitted for purposes of the claims under Rule 10b-5. The court's materiality instructions included the following paragraph:

> Preliminary negotiations or plans concerning mergers, reorganizations or other significant corporate transactions like a stock buy-back are not considered "material" facts requiring disclosures to the investing public unless and until there is a proposal or an agreement incorporating the fundamental terms of the transaction, such as price and structure. So long as discussions regarding such developments are preliminary, tentative, or contingent in nature, such information is not "material" as a matter of law and there is no duty to disclose it.

Appellants' present attack upon this instruction rests on *Basic, Inc. v. Levinson,*[7] decided after trial in this case. The Court concluded in *Basic* that an omitted fact is material when there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[8] The district court included much of the *Basic* language in its instruction on "materiality." However, the *Basic* Court rejected and the district court here insisted upon an "agreement-in-principle" test

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7. 108 S.Ct. 978 (1988).

8. *Id.* at 983 (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 2132, 48 L.Ed.2d. 757 (1976)).

for determining the materiality of preliminary plans or negotiations.[9] Appellants argue that the charge thus trips on its explanation of the materiality of preliminary plans or negotiations.

A "formal objection is not necessary if the trial judge was fairly apprised of the nature of the objection."[10] Appellants objected to the charge "to the extent any charge [they] requested was not given by the Court." This is little more than a nod to Rule 51; it is not sufficient to inform the trial court of a perceived problem. Appellants also suggest that they objected to the materiality instructions in a conference with the district court's law clerk. Such communication with a law clerk may assist the court in its preparation of the charge. It is not a legally sufficient objection. Moreover, this "conference" with the law clerk was not included in the record on appeal. In sum, we find no adequate objection and without an objection, we will listen only to plain error.

As we will explain, we are persuaded that any error in the instruction challenged was likely harmless, but in any event was not the cause of injustice. The argument is that the charge's insistence that merger or reorganization plans did not become material until there was an agreement to the fundamental terms of the scheme prejudiced the claim that defendants wrongfully failed to disclose the "plan to go private through an LBO"; that the company's tender offer was a part of the "undisclosed plan to go private," that the plan existed in May of 1982, and that the district court's instruction prevented the jury from considering whether information regarding the tender offer should have been disclosed earlier.

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9. *Id.* at 986.

10. *Bass v. United States Department of Agriculture*, 737 F.2d 1408, 1413 (5th Cir. 1984) (citing *Williams v. Hennessey*, 328 F.2d 490, 491 (5th Cir. 1964)).

Despite its surface appeal the argument is deeply flawed. First, any error in the definition of materiality, specifically its insistence on an agreement in principle, had no bearing on the Buyer Class. This class asserted non-disclosures regarding the grand jury investigation. Appellants now suggest, although it is unclear that they made the argument at trial, that insisting on an agreement as the litmus of materiality foreclosed their argument that defendants ought to have disclosed the Lazard Plan in January 1982. How such a failure could have injured the *Buyer* Class is not explained. We are not persuaded that the claims of the Buyer Class suffered from the error in the charge.

We also find no prejudice to the Seller Class and Tender Class claims under Rule 10b-5. By insisting on an agreement in principle as a trigger to any obligation to disclose, the charge erroneously narrowed defendants' obligation to make any disclosure. But this error was not of consequence here. The theory of damages suffered by the Seller and Tender Classes did not depend on a failure to disclose, but rather rested on the assertion that the May 27, 1982 press release, announcing consideration of a two public companies plan, was a sham, a ploy to drive down the price of Tesoro stock, so that the tender offer could be made at less cost to the comany.[11] Indeed, the damage proof rested on this theory. A damage expert based his damage estimates for the Seller and Tender Classes on a comparison of actual stock prices from May 27 through September 30, and the stock prices which might have occurred had the company made the tender offer on May 27. In sum, the claim of the Seller and Tender Classes was that defendants fraudulently misstated the plan, and the charge correctly submitted that theory.

Immediately after the portion of the challenged materiality instructions, the district court instructed the jury that

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11. Appellants' relevant contentions, as set forth in the Pretrial Order, are reproduced in Appendix A to this opinion.

"any disclosure of such plans, even if not required, must be complete and accurate." Thus, if the jury believed appellants' theory that the May 27 press release was a sham, then the company's disclosure would not be "complete and accurate," and the district court's instructions would compel a finding that the company's omissions were material.

Finally, and relatedly, the theories advanced at trial by the Seller and Tender Classes did not rest on a contention that material planning short of an agreement in principal was wrongfully not disclosed. Rather they urged that Tesoro did have a fully developed plan not disclosed by Tesoro as part of its objective to drive down the price of the stock before effectuating its plan. Thus, insisting on an agreement in principle, while contrary to *Basic,* imposed no additional burden on the Seller and Tender Classes.

We do not review the abstract correctness of a charge. Rather we ask whether in the context of trial the jury was fairly and accurately instructed. Inaccurate statements that prove in retrospect to have been demonstrably irrelevant are just that — irrelevant and inconsequential errors — not unusual attendants to long and hard fought trials. In context, the failure to fully anticipate *Basic* proves to be just such an irrelevancy.

2. *Business Judgment Rule*

The derivative plaintiff also challenges the district court's instructions regarding the business judgment rule under Delaware law. As we understand it, the argument is that the district court should have conditioned the jury's application of the business judgment rule on a prior finding that the directors fulfilled their fiduciary duties to the corporation. The focus is upon one sentence from *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[12] in which the Delaware Supreme Court stated that "[w]hile the business judgment rule may be applicable to the actions of corporate

12. 506 A.2d 173, 180 (Del. 1986).

directors responding to takeover threats, the principles upon which it is founded — care, loyalty and independence — must first be satisfied." The argument continues that the instructions on the business judgment rule as a whole misled the jury into believing that the directors' resistance to the Diamond Shamrock takeover attempt was conclusively presumed to be valid. The contention at trial was that defendants failed to exercise due care, failed to act on an informed basis, and resisted the takeover out of a desire to maintain their positions at Tesoro and prevent the company from cooperating fully in the grand jury investigation.

We find no error in the district court's instructions. The court began with a complete description of the directors' fiduciary duties. It then emphasized the fiduciary duties in a takeover situation:

> Where a corporation is approached by a third party, whether such party is already a shareholder or not, and such party desires to acquire the outstanding shares of the corporation, the director's fiduciary duties to the shareholders apply fully in determining what course of action to take. When a board opposes a takeover threat or when it implements anti-takeover measures there is a potential for conflict between the interests of the board and management on the one hand [and] the shareholders on the other. Accordingly in such a situation the directors must at all times act in good faith, on an informed basis and in the honest belief that their action is in the best interest of the company and its shareholders.

After describing the business judgment rule, the court instructed the jury that defendants could only rely on its protection if they first established that they "reasonably perceived a threat to the corporate policy and effectiveness of the company" from the takeover, and that the "response made was reasonable in relation to the threat they perceived." In discussing the first prong of this test, the court

stated that the directors could "satisfy their burden on this issue by showing that they acted in good faith and after reasonable investigation." The judge further emphasized that "[t]here can be no self-dealing, nor can the directors in responding to a possible takeover action bad faith, fraudulently, or to protect or further the interests of all or some of the directors." While instructing that the jury could only find the directors' decision uninformed if the directors were grossly negligent, the court also stated that "the methods and procedures they follow in gathering and analyzing information cannot be restricted in scope, shallow in execution, a mere pretext, half-hearted, or a sham."

These portions of the charge amply placed on the directors the burden of showing that they met their fiduciary duties before enjoying the protection of the business judgment rule. It is plain that the jury instructions did not establish a conclusive presumption in favor of the directors' acts. In short we are not persuaded that the district court misstated the responsibilities of directors under Delaware law in responding to a takeover threat.

B. *Jury Tampering*

Appellants argue that the district court abused its discretion in its handling of their charges of jury tampering raised in their motion for new trial. It is true that one of the court security personnel assigned to the case, Finton Stewart, was convicted after offering to sell the appellants information that the jury had been compromised. Nonetheless, we find no abuse of discretion.

In response to questions by appellants' counsel during a transcribed interview given after Stewart's arrest, Stewart indicated that a juror had been seen several times speaking with one of the United States Marshals. Stewart had also been told that the two were observed together on one occasion outside the courthouse. Stewart did not know the substance of their conversations. Stewart also related an incident in which another of the jurors had complained

about extraneous information in the jury room which had not been presented during trial. Though court security personnel are normally required to report such matters to the judge, no such report was made of this incident.

The district court interviewed each of the jury members *in camera*. Mindful of the limitations on juror testimony imposed by F.R. Evid. 606(b), the court carefully framed its questions to limit its inquiry into what extraneous information had been discussed by the jury and whether court personnel had attempted to influence the jurors. The court later gave appellants the opportunity to offer evidence of jury tampering, but refused to allow a "fishing expedition" pursued through cross-examination of court security officers.

How best to gather information regarding alleged jury misconduct is a matter of trial court discretion.[13] The judge's questioning reflected a careful attempt to draw the balance required by Rule 606(b), inquiring into objective events that might constitute extraneous influences on the jury, while avoiding any examination of the jury's subjective deliberation process.[14]

The district court also has broad discretion in determining whether to grant the motion for new trial based on jury misconduct.[15] The district court found no evidence that any jurors were biased toward the defendants. He found that only two pieces of extraneous information entered the jury room. First, the jurors discussed the fact that a defendant's wife had been treated for mental illness in an institution. Second, one juror reported overhearing a settlement discussion between two of the opposing attorneys. The district court found that these matters were mentioned only briefly, and afterwards the foreman instructed that they

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13. *Carson v. Poley*, 689 F.2d 562, 580 (5th Cir. 1982); *Martinez v. Food City, Inc.*, 658 F.2d 369, 372 (5th Cir. Unit A Oct. 1981).

14. *See Martinez*, 658 F.2d at 373.

15. *Carson*, 689 F.2d at 580.

could not be considered. The district court concluded, and we agree, that under the circumstances there was no reasonable possibility that this information prejudiced the appellants.

The jurors also mentioned other items discussed in the jury room that arguably went beyond the evidence presented at trial. These included such matters as the existence of insurance to pay any judgment, the effect of a verdict on the local economy, the assessment of trial costs in case of a hung jury, and the trebling of damages under RICO. But again, discussion was brief and the jury foreman directed the jurors to proper subjects of consideration.

The district court believed inquiry into these matters was foreclosed by Rule 606(b) as an invasion of the jury's deliberation process. We cannot say that the district court abused its discretion in this judgment, although admittedly the line between consideration of facts not received in evidence and extraneous influence is uncertain at the margins. To the extent the mention of these subjects is considered extraneous information within the exception to Rule 606(b), we find no reasonable possibility of prejudice to the appellants, given the instruction by the court that deliberations were to be confined to the evidence at trial and the credited testimony of the jury foreman that he reminded the jury of its duty to confine itself to the evidence.

C. *Advice of Counsel*

Appellants contend that the district court erred in allowing reliance on advice of counsel as a defense, when the court had denied discovery of certain information concerning advice given by counsel. Appellants sought discovery of documents relating to advice given by the law firm of Kirkland & Ellis to the 1981 and 1982 Special Committees. After brief *in camera* review of the documents submitted by appellees, the district court allowed access to all material relating to the 1982 Special Committee, rejecting appellees' claim that the documents were protected by attorney-client

privilege. The court did protect documents relating to the 1981 Special Committee, finding attorney-client and work product privileges, and expressing concern for grand jury secrecy. Nevertheless, the court allowed discovery of documents jointly considered by the two committees.

Appellants complain that they could not test the foundations of the advice given by Kirkland & Ellis to the 1981 Special Committee. They argue that they were prevented from exploring "the basis for, grounds of, and reliability of the advice received from counsel." However, they do not challenge appellees' right to rely on an advice of counsel defense with respect to disclosures authorized by the 1982 Special Committee. Nor do appellants take exception to the correctness of the instruction regarding advice of counsel. In essence, then, appellants have only the argument that the jury instruction on advice of counsel should have been confined to the 1982 Special Committee. The district court's error, if any, was in failing to tailor the advice of counsel instruction to prevent its application to claims relating to the 1981 Special Committee. But appellants did not ask the district court to narrow the instruction to 1982. Rather, they objected to the advice of counsel instruction "in its entirety," arguing that "we don't believe it would be appropriate under any circumstances to give that instruction here," an objection properly rejected by the district court. For whatever reason, appellants never modified their "all or nothing" stance in objecting to the advice of counsel instruction.

We do not suggest any "error" in counsel's electing not to draw distinctions between the treatment the jury might give to the 1981 and 1982 advice to the Special Committee. We can surmise several plausible and rational sound trial judgments behind the elected course. Such rationality only reinforces our unusual resolve to confine our task as an appellate court to considering the correctness of decisions made by the trial court. Stated another way, there is no injustice or technicality here. Trials abound with tactical choices and injustice is more often the companion of our

failure to accept them and allow shifts in position from trial to appeal. Appellants knew that the advice of counsel defense was proper with respect to advice given in 1982, since they drew the distinction themselves in a footnote to their pretrial motion on this issue, admitting that they did not seek to bar an advice of counsel defense "where plaintiffs have had opportunity for full discovery regarding such advice." Nevertheless, after the events of trial, appellants sought only the elimination of any such defense from the charge. We will not allow appellants to return on appeal to their pretrial position, having abandoned that position in objecting to the jury instructions.

D. *Attacks on Counsel*

Appellants argue that passion and prejudice infected the verdict, an argument that faces the practical difficulty that the jury deliberated for three weeks. In appellants' view, the jury was inflamed by personal attacks made on their lead counsel in appellees' opening and closing arguments. Appellants also focus on what they characterize as "us-against-them" arguments, allegedly designed to prejudice the jury against appellants' Philadelphia counsel. Appellants objected to the former type of argument, but made no objection to the latter. Appellants did not ask for a mistrial before jury deliberations. Instead, they requested and received a corrective instruction, in which the court emphasized the inappropriateness of attacks by one attorney on another and charged the jury not to consider such attacks for any purpose. We have noted before that a district judge occupies the best position from which to observe how an attorney's conduct impacts the jury.[16] The decision not to grant a new trial is reviewed under an abuse of discretion standard. Further, the appellants' failure to request a

16. *Maldonado v. Missouri Pacific Ry. Co.*, 798 F.2d 764, 771 (5th Cir. 1986) (quoting *South Hampton Co. v. Stinnes Corp.*, 733 F.2d 1108, 1123 (5th Cir. 1984)), *cert. denied*, 107 S.Ct. 1571 (1987).

mistrial before the verdict, in essence choosing to gamble on the jury verdict, weighs against a new trial.[17] In these circumstances, we defer to the district court's decision that a new trial was not warranted.

E. *Insider Trading*

Throughout the trial, appellees over objection sought to show that Mr. Walker, one of the class representatives, and Mr. Meyer, who withdrew as a named plaintiff prior to trial, but remained a class member, had traded in Tesoro stock based on inside information. We find no abuse of discretion. The charges of insider trading related to reliance, an essential element of appellants' securities fraud claim.

Appellants also challenge the exclusion of evidence regarding a state court lawsuit filed by Tesoro. The lawsuit originally raised claims of insider trading against Meyer and Walker. Tesoro voluntarily dismissed the insider trading charges before trial in that case. Appellants claim that the district court should have permitted evidence regarding the state court suit to show that Tesoro had been unable to prove its charges of insider trading. We find no abuse of discretion in the district court's ruling. Voluntary dismissal of a suit can occur for a variety of reasons. The relevance of the state court action was, thus, marginal, and the district court could properly exclude the evidence under F.R. Evid. 403.

F. *President Ford*

Appellants complain that the district court allowed the jury to view a videotaped deposition of former President Ford, a Tesoro director. The argument is that President Ford had no personal knowledge of the events forming the basis for the lawsuit, and that his evidence consisted primarily of favorable character evidence offered on behalf of Tesoro's CEO. Appellants filed a motion in limine, seeking exclusion of references to President Ford, other than the fact that he is a current director, without first obtaining a ruling

17. *Id.*

from the bench. However, "an objection is required to preserve error in the admission of testimony or the allowance of cross-examination even when a party has unsuccessfully moved in limine to suppress that testimony or cross-examination."[18] Other than the motion in limine, we find no place in the record where appellants objected to President Ford's testimony on the ground that it constituted character evidence inadmissible under F.R. Evid. 404(a).[19]

Admission of President Ford's testimony regarding his high esteem for Tesoro's CEO was not plain error. Rule 404(a)(1) allows evidence of relevant character traits of an "accused" individual. Such evidence can be admissible in a civil trial raising quasi-criminal allegations against a defendant.[20] In this case, appellants promised during opening argument to show the jury the "sinister dark side of [the CEO]." During trial, Dr. West was accused of obstructing justice, defrauding the government, perjury, and criminal bribery. It was not "plain error" to admit character evidence on his behalf.

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18. *Collins v. Wayne Corp.*, 621 F.2d 777, 785 (5th Cir. 1980); *see also Wilson v. Waggener*, 837 F.2d 220, 222 (5th Cir. 1988).

19. Appellants only made two objections during the playing of President Ford's deposition, one of which was sustained. The other objection related to two questions regarding the current Board of Tesoro. Appellants objected that the questions were leading and suggestive and that the testimony elicited was irrelevant to the issues in the lawsuit. They did not object to the testimony as being inadmissible character evidence concerning Tesoro's CEO. Nor do we find such an objection in the document entitled Plaintiffs' Objections and Cross Designations Re: Designation of Gerald R. Ford. That document objected generally to introduction of a videotaped deposition, but not to having President Ford's testimony read into the record. It also listed specific objections to portions of the testimony, but did not include the complaint raised here. Further, it raised no objection to the specific portions of the Ford deposition included by appellants in the record excerpts they filed with this court as examples of the objectionable testimony.

20. *Carson v. Polley*, 689 F.2d 562, 575-76 (5th Cir. 1982).

Further, President Ford's testimony related to other issues in the trial. He testified concerning the functions of a board of directors and the role of special committees, valuable background for the jury. President Ford was also able to inform the jury of the business and regulatory climate before passage of the post-Watergate Foreign Corrupt Practices Act, when Tesoro made "sensitive payments" to foreign governments.

G. *Costs*

We agree with the appellants that the district court abused its discretion in awarding the cost of an original and eleven copies of the daily trial transcript. Daily transcript costs may be awarded only upon a finding "that they were not 'obtained primarily for the convenience' of the parties but were 'necessarily obtained for use in this case.' "[21] The district court so found. He reasoned that the complexity and length of the trial, combined with the fact that Tesoro and the nine individual defendants regularly had ten to twelve attorneys in the courtroom, made it necessary to obtain an original and eleven copies of the daily transcript.

In *In re Nissan Antitrust Litigation,*[22] a complicated antitrust case involving a five-week trial, we reversed an award of costs for a daily trial transcript as an abuse of discretion. In this case, the district court divided the defendants into four groups and would only allow one attorney from each group to address any particular issue or cross-examine any particular witness. Thus, while we respect the district court's finding that a daily transcript was necessary, we cannot approve an award of costs for more than four total copies of the daily transcript. Anything more was solely

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21. *Studiengesellschaft Kohle v. Eastman Kodak Co.*, 713 F.2d 128, 133 (5th Cir. 1983) (quoting *Brumley Estate v. Iowa Beef Processors, Inc.*, 704 F.2d 1362, 1363 (5th Cir. 1983)).

22. 577 F.2d 910, 918 (5th Cir. 1978), *cert. denied sub nom. PDQ, Inc. v. Nissan Motor Corp.*, 439 U.S. 1072 (1979).

for the convenience of the parties. We find no abuse of discretion with regard to the other costs awarded by the district court.

III. CONCLUSION

This was a hard fought lengthy jury trial with able lawyers. Appellants received a fair trial and as we see the dispute — it's over. We affirm the judgment below. We also affirm the award of costs except we modify the award of costs for daily copy to include only an original and three extra copies of the daily trial transcript.

AFFIRMED in part, MODIFIED in part.

Appendix A

Pretrial Order, Plaintiffs' Contentions (excerpt):

By May 16, 1982 . . . the 1982 Special Committee decided that the plan to go private could not be implemented because the company would have to disclose the allegations of wrongdoing by Tesoro and West, which would not only expose Tesoro's foreign assets to a significant risk of loss, but would be personally "painful" to West.

Admiral Zumwalt knew West was firmly entrenched in implementing the plan to go private, but the 1982 Special Committee decided it would be best for the company for West himself to withdraw it. Plaintiff's evidence will show that while the plan to go private was ostensibly withdrawn, West only delayed his ultimate goal. He decided instead to accomplish that objective in a series of steps, the first of which would be a repurchase of stock. A self-tender of Tesoro stock had been discussed earlier, was always a viable option, and could be funded from money readily available. In light of the disclosure problems, though, West knew he could not announce that the tender was the first step in a going private transaction, and he did not. A repurchase, though, would decrease the number of outstanding shares, increase management's ownership percentage, test the water, for the ultimate going private transaction and make a complete tender easier to do later.

Plaintiffs will show, however, that defendants knew the trading price of Tesoro's stock too high [sic] in May because the market was anticipating a reorganization plan from the 1982 Special Committee. West and the others wanted to reduce the price so they could do the tender offer at a much price [sic] and to keep down the trading price of the stock after the tender. Thus, West and management decided to drive down the price of Tesoro stock in advance of the tender, announce a self-tender for ⅓ of the outstanding stock with the money readily available, and then use the proceeds from the later sale of the interests in Trinidad-Tesoro to

make further self-tenders. In the interim, it was hoped the grand jury investigation would end, which would permit management to announce it was going private and buy in the remaining stock.

To drive down the price of the stock, West and management decided to announce the so-called two company plan, which was a sham. It was not economically viable, nor could it be implemented without adverse disclosures until the grand jury investigation was favorably resolved. Between May 16 and 26, West, Bloyd and Stewart, who knew the true facts, also represented in public statements that the 1982 Special Committee was still considering reorganization plans and had not yet reached any decision. They drafted the May 27, 1982 press release to make it appear as if it was the recommendation of the 1982 Special Committee. Thereafter, they proceeded to complete the tender at the very same price they had characterized as undervalued just six months earlier.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-5617
88-5512
88-5534

D.C. Docket No. SA-82-CA-824 and
SA-82-CA-825

ROBERT J. BOLTON, ET AL.,
Plaintiffs-Appellants,

VS.

TESORO PETROLEUM CORP., ET AL.,
Defendants-Appellees.

ROBERT J. BOLTON, ETC., ET AL.,
Plaintiffs-Appellants,

VS.

ROBERT V. WEST, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Western District of Texas

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Before GEE, REAVLEY, and HIGGINBOTHAM, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the District Court in this cause as modified are affirmed in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

April 24, 1989